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No. 79-6027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

RAYMOND WOOD, EDNA ALLEN AND JAMES TANTE,

Petitioners,

v.

THE STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. In cases arising in the criminal justice system, should lack of wealth be a suspect classification for purposes of equal protection analysis?

2. May a trial judge who has made a determination that probation is the pertinent punishment for one convicted of a crime, later revoke that probation for the nonpayment of a fine which was to have been paid in installments during the period of probation when during that period no payments are made, nor has the offender made any effort to comply with this term of his probation?

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BRIEF OF RESPONDENT, THE STATE OF GEORGIA ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

OPINION BELOW

The opinion of the Court of Appeals of Georgia is reported at 150 Ga. App. 582, 258 S.E.2d 171 (1979).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution:

> No State shall . . . deny any person within its jurisdiction the equal protection of the laws.

It also involves the following provisions of state law (unofficially codified as):

> Ga. Code Ann. § 27-2709 (1978 Rev.): [Statewide Probation Act]; jurisdiction

of courts; procedure; hearings; reference to circuit probation supervisor; period of probation; disposition of prisoner pending hearing; payment of fines or costs as condition precedent to probation.

* * * *

If it appears to [the] court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay and suspend the execution of such sentence or any portion thereof, and may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation.

* * * *

The court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation.

Ga. Code Ann. § 27-2901 (1978 Rev.): Time of payment of fines.

Every fine imposed by the court under the authority of this Code shall be paid immediately or within such reasonable time as the court may grant.

STATEMENT OF THE CASE

Petitioners were placed on probation under Georgia's Statewide Probation Act, Ga. Code Ann. § 27-2709 following their convictions under the State's obscenity statute. Ga. Code Ann. § 26-2101. The convictions of Petitioners Edna Allen and James Tante arose in connection with their employment at a movie theater in Atlanta, Georgia, which showed films which were found to be obscene in violation of the State's obscenity laws. The convictions of Petitioners Allen and Tante were affirmed by the Court of Appeals of Georgia. Allen, et al. v. State, 144 Ga. App. 233, 240 S.E.2d 754 (1977). Petitioner Wood was convicted for distributing obscene materials under the same Georgia statute, and his conviction was likewise affirmed by the Court of Appeals of Georgia. Wood v. State, 144 Ga. App. 236, 240 S.E.2d 743 (1977).

Petitioner Wood was sentenced to a $5,000.00 fine on each of two counts charging him with distributing obscene material, and placed on twelve months probation on each count, with both counts to run consecutively. (Appendix 23-25). Allen and Tante were sentenced to a $5,000.00 fine and twelve months on probation. (Appendix 17-22).

The sentences of all three Petitioners were imposed on October 23, 1978. (Appendix 19, 22, 25). The above mentioned fines were to be paid on an installment basis, by making payment to the Fulton County Probation Office at the rate of $500.00 per month for ten months by each Petitioner. (Appendix 18, 21, 24). Some two and one-half months after Petitioners were placed on probation petitions for the revocation of their probation were filed by their probation officers with the court due to the failure of each Petitioner to comply

with that aspect of their condition of probation to pay monthly installments of $500.00 as set forth in the trial court's orders of October 23, 1978. (Appendix 26-31). On January 26, 1979, a hearing was held pursuant to the revocation petitions which had been filed by the probation officers against Petitioners. There does not seem to be any dispute amongst the Petitioners that their period of probation commenced on October 23, 1978.

At the probation revocation hearing, it was established that each Petitioner had not only failed to make the full $500.00 monthly payments as required by the court's orders of probation, but had failed to pay anything at all on the fines. (T. 3, 30, 32, 48, 49). The reason brought out by each Petitioner as to their failure to pay anything at all was not so much their alleged

indigency, but rather their reliance on the promise of the "Adult Entertainment" establishments for which they had been employed to pay the fines for them. (T. 4, 13, 14, 16, 31, 33, 35, 62). Each Petitioner gave testimony which indicated that when they were hired they were told by their employers that any fines which might be adjudged against them would be taken care of in connection with any litigation growing out of their employment. (T. 4, 13, 41, 43, 62). Undoubtedly, during the sentencing Petitioners did not protest their fines or probation which was imposed upon them because they thought that the organizations they were employed by would pay their fines.[1/]

1/ Before Petitioners were sentenced in this case they were again convicted on obscenity charges growing out of convictions from their employment with the same employers from whom the present set of circumstances arises. In those cases the fines were paid by the employers in accordance with the expectancy and assurances that fines and other costs of litigation would be paid in those matters, and were in fact paid by the attorney who represents the Petitioners in this matter. (T. 12, 41, 51, 57).

At the probation revocation proceedings the court heard testimony from the probation officers of the respective Petitioners which established that none of the Petitioners had paid the required $500.00 per month, nor had they paid any money to the probation office at all. None of the Petitioners sought any modification of the probation order to reduce the fine, nor did they at the time the sentence of fine and probation was pronounced cause there to be entered any objection or make any comments to the court that they would not be able to pay the fine. Neither have the Petitioners established that they are indigent, but rather gave testimony that their income was not sufficient to meet the monthly payments. (T. 10, 37, 55).

On February 8, 1979, the State Court of Fulton County entered orders as to each

Petitioner which provided that each Petitioner had until February 13, 1979, to pay the arrearage, and upon failure to do so because of a change in condition probation would be revoked, and was in fact revoked. (Appendix 32-34). Petitioners' lawyer on February 12, 1979, then sought to modify the conditions of the probation orders, but this was denied by the court. (Appendix 35-37). Petitioners failed to pay the arrearages. Confinement resulted.

SUMMARY OF THE ARGUMENT

The initial issue which must be explored in this equal protection case, arising in the criminal justice system, is whether being economically disadvantaged constitutes a "suspect" class. Such an examination is necessary, since if lack of wealth is "suspect," a strict standard of judicial scrutiny is employed; if lack of wealth is not a "suspect" classification, then the state action in question will pass constitutional scrutiny if it is rationally related to the achievement of a legitimate state policy. Compare, McLaughlin v. Florida, 397 U.S. 184 (1964) with McGowan v. Maryland, 366 U.S. 420 (1961).

Financial need has never been labeled "suspect" in cases that do not originate in the criminal justice system, and the reasons why financial need should not identify a "suspect" class for equal protection purposes

in the non-criminal justice context are just as persuasive as those cases arising in the criminal justice system. Most importantly, in examining those equal protection cases which have their genesis in criminal law we find that they are closely examined, with the traditional test of rationality being employed in cases that may be broadly grouped in terms of adequacy of judicial review, e.g., Griffin v. Illinois, 351 U.S. 12 (1956), cost recoupment, e.g., Rinaldi v. Yeager, 384 U.S. 305 (1966) and fines, e.g., Williams v. Illinois 399 U.S. 235 (1970). The same analysis is applicable in this case.

Subjecting the sentences in this case to the test of whether the classification drawn - admittedly made in the exercise of individualized sentencing discretion - is

rationally related to the achievement of permissible state policy, these cases do not offend the Equal Protection Clause. Financial resources which might be available to a defendant to and including looking to individuals in a community from whom those financial resources might be available is one relevant factor which a trial court may use in determining whether the individual is an acceptable risk for probation. The question of financial resources of a defendant may or may not be a factor in certain cases, as in other cases it may be important to the sentencing judge as he considers his sentencing alternatives. Permitting a trial judge in an appropriate case to weigh the factor of whether a sentence should be probated, and on what conditions, furthers two important state interests, namely the broad sentencing discretion necessary for

an effective criminal justice system which in turn, aids the efficacy of a criminal justice subsystem - probation - which to be fully effective, must have a broad base of public support.

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THE STATE OF GEORGIA,

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

ARGUMENT

1.

ECONOMIC DISADVANTAGE HAS NOT BEEN ACCEPTED AS A SUSPECT CLASS FOR PURPOSES OF EQUAL PROTECTION ANALYSIS IN AREAS OF THE LAW ARISING OUTSIDE THE ADMINISTRATION OF CRIMINAL JUSTICE.

The Equal Protection Clause has always been thought to allow differences in treatment,

even with some resulting in inequality, so long as the state's purpose can be rationally justified. McGowan v. Maryland, 366 U.S. 420, 425 (1961). Petitioners recognize that equal protection does not require "absolute equality." See brief of Petitioners at page 8. Consequently, absent invidious discrimination, a rationally based classification does not run afoul of the Equal Protection Clause. Massachusetts Board of Retirement v. Murgia, 427 U.S. 207 (1976); Dandridge v. Williams, 397 U.S. 471, 485 (1970); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). This Court has recognized that absent invidious discrimination, and where the state has a rationally based purpose the fact that its action impacts more heavily on individuals who are not members of a suspect class does not prove a discriminatory purpose or intent in the application of a state statute or

procedure. See Arlington Heights v. Metro Housing, 429 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229 (1976).

Petitioners' argument to this Court is that poverty is a suspect classification, and therefore the imprisonment of them for failure to pay the fines which were a condition of their probation should be subjected to strict judicial scrutiny. See brief of Petitioners, pp. 9-10. A suspect class, for the purposes of equal protection analysis, is one saddled with such disabilities as to be subjected to a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. Massachusetts Board of Retirement v. Murgin, 427 U.S. 307, 313 (1976). While this Court has viewed certain classifications as "inherently suspect," examining such "suspect"

classifications with close judicial scrutiny such as race, McLaughlin v. Florida, 379 U.S. 184 (1964), nationality, Loving v. Virginia, 388 U.S. 1, 9 (1967), and alienage, Graham v. Richardson, 403 U.S. 365 (1971), economic disadvantage by itself has not been identified as a suspect classification for the purposes of equal protection examination. Maher v. Roe, 432 U.S. 461, 471 (1977); San Antonio School District v. Rodriguez, 411 U.S. 1, 29 (1973); Dandridge v. Williams, supra, 397 U.S. at 484-485.

Petitioners make the assumption that financial need or ability have already been labeled by this Court as a "suspect" class when it comes to the administration of criminal justice, relying upon Griffin v. Illinois, 351 U.S. 12 (1956). See brief for Petitioners at p. 8.

While those who are economically disadvantaged may be confronted with an imposing

wall of finances which keeps them from the life style which they might aspire to, and while the fact that their financial resources are less than those of the more affluent individuals in society and therefore causes them to undergo greater economic hardship, these alone do not constitute a violation of the Equal Protection Clause. In fact, government regulations sometime present a financial difficulty for the economically disadvantaged who seek to take advantage of a benefit or service by which those who are financially well off can easily pay, and yet prepayment of certain fees can be exacted from all individuals regardless of their financial status. /2 This Court has

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2/ Prepayment of fees for those who seek to file a bankruptcy petition, United States v. Kras, 409 U.S. 434 (1973), and filing of appeals through a higher court in a civil proceeding. Ortwein v. Schwab, 410 U.S. 656 (1973).

found that states need not fund abortions for indigent women simply because child birth is funded, Maher v. Roe, supra, nor must a state in its educational system require precisely equal per pupil expenditures between the affluent and less affluent school districts, San Antonio School District v. Rodriguez, supra, nor must it provide additional money because a welfare recipient has more children than the maximum number for which welfare payments can be made. Dandridge v. Williams, supra. Thus, it can be seen that the fact that there is an impact on those of less financial affluency does not render financial ability, i.e., poverty, a suspect classification for the purposes of equal protection. See Arlington Heights v. Metro Housing, supra.

Petitioners have correctly pointed out that the decisions above have arisen in the area of "economics and social welfare."

See brief of Petitioner at page 7.

Similar to the cases which arise in a social welfare-economic context where "the equal protection clause does not require absolute equality or precisely equal advantages," San Antonio Independent School District v. Rodriguez, 411 U.S. at 24, likewise in the criminal justice area a state need not "duplicate the legal arsenal that may be privately retained by a criminal defendant. . . ." Ross v. Moffitt, 417 U.S. 600, 616 (1974). Likewise, while an individual of less means is entitled to court appointed counsel, the court is under no duty to retain a high priced attorney. Griffin v. Illinois, supra, 351 U.S. at 23 (Frankfurter, J., concurring).

While this Court has not been insensitive to those who are economically disadvantaged, in none of the cases in which

the equal protection clause has been applied has the Court identified indigency as a "suspect class." What this Court has done is examine state statutes and practices which place the indigent at a disadvantage in the criminal justice process, invalidating those procedures where there has been no rational basis for the state's action. This Court in the criminal justice area following conviction, has provided indigent defendants with the right of a free transcript to review their criminal conviction[3/] and assistance of counsel on direct appeal.[4/]

As noted by this Court in Smith v. Bennett, 365 U.S. 708 (1961), a case concerning the requirement of the payment of a filing fee before a habeas corpus petition

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3/ Griffin v. Illinois, 351 U.S. 12 (1956).

4/ Douglas v. California, 372 U.S. 353 (1963).

could be filed, the thrust of Griffin, was the lack of a rational basis in statutes implicitly assuming that an indigent's efforts to have his case reviewed were less meritorious than the efforts of other defendants. Id. at 710. Consequently, decisions by this Court striking down statutes that required the payment of a filing fee before an indigent can seek appellate review, Burns v. Ohio, 360 U.S. 252 (1959), and the paying of a fee before the filing of a habeas corpus petition, Smith v. Bennett, supra, are decisions which hold that state practices and procedures which place an insurmountable obstacle between the indigent defendant and his ability to secure a review of his conviction, a matter which would be otherwise available to a person with money, are irrational, and thus, offensive under the Equal Protection Clause. However, more importantly, for the

purposes of this matter is the fact that indigency in and of itself has never been viewed as "suspect;" the test has been and should continue to be "a rational basis" and not "strict judicial scrutiny."

In Berman v. United States, 302 U.S. 211 (1937), poverty in the probation context was not held to be deserving of heightened judicial scrutiny.

> Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered. Probation or suspension of sentence 'comes as an act of grace to one convicted of a crime.' Escoe v. Zerbst, 295 U.S. 490, 492, 493. The considerations it involves are entirely apart from any re-examination of the merits of the litigation. Probation was designed 'to aid the rehabilitation of a pertinent offender; to take advantage of

> an opportunity for reformation which actual service of the suspended sentence might make less probable.' Thus probation cannot be demanded as a right. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. Id. at 220.

Consequently, while Griffin v. Illinois, supra, stands for the application of a heightened degree of scrutiny in matters relating to a defendant's effective access to review the findings of criminal guilt, the review of a matter of probation and the payment of a fine and the later incarceration because of failing to meet a condition of probation does not involve any "fundamental interest" which deserves heightened judicial scrutiny.

In those cases involving equal protection in terms of state statutes seeking to recover costs[5/] and fines[6/] the Court has applied

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5/ Rinaldi v. Yeager, 384 U.S. 305 (1966).

6/ Tate v. Short, 401 U.S. 395 (1971).

the rational basis test and not a test of strict judicial scrutiny. Again, indigency has never been viewed as suspect so as to invoke the latter doctrine.

The cases in which the Petitioners place heavy reliance - Tate v. Short, 401 U.S. 395 (1971, Morris v. Schoonfield, 399 U.S. 508 (1970), and Williams v. Illinois, 399 U.S. 235 (1970) - also do not view indigency as necessarily suspect for purposes of equal protection analysis. Rather the Court has examined the rationality of the statutory schemes in accordance with the objectives of the statutory plans.

In Williams v. Illinois, supra, the court examined a statutory scheme which allowed the imprisonment of defendants beyond the state statutory maximums for

their respective offenses because the fines were converted into days of incarceration at the rate of $5.00 per day. Id. at 236. The Court struck down the practice holding that it created one maximum punishment for those who could afford the fine but a greater maximum penalty for the poor. Id. at 240-241, 243. The Court in Tate v. Short, 401 U.S. 395 (1971), struck down a procedure which substituted jail time for an unpaid fine, even though jail time could not have been imposed for the charge of which the defendant had been found guilty. Again rationality was found wanting. In Morris v. Schoonfield, supra, imprisonment of an indigent defendant who could not immediately pay a fine could not be converted into a period of imprisonment because of indigency. Both Williams, supra and Tate, supra, addressed factual situations in which criminal defendants were punished

beyond the state statutory maximums for their respective offenses solely because of their inability to pay fines. The present case does not involve or even remotely involve similar facts. Sub judice, the revocation of Petitioners' probated sentences does not punish them beyond the statutory maximum.

To date the Court has made it clear that economic disadvantage has not been accepted as a "suspect class" for purposes of equal protection analysis in areas of law arising outside the administration of criminal justice and as such economic status in itself has not been found to be sufficient to engage strict judicial scrutiny in criminal cases.

Petitioners have offered no reason why economic status should be deemed "suspect" in criminal law and related matters, but

merely assume that economic status is already suspect. None of the indicia of suspectness in cases previously decided by the Court such as immutability of classification or the existence of stereotyping are present. Poverty, unlike race, is certainly not an immutable characteristic. Neither is poverty in the probation context based on prejudicial stereotyping, but is a factor which may be legitimately examined in considering and assessing the risk involved in granting probation to a given defendant, but more will be said in that regard later. In deciding whether the sentence imposed on the Petitioners in this case is permissible under the Equal Protection Clause, the test should be the traditional one of rationality and not that of strict judicial scrutiny.

II

THE FINANCIAL RESOURCES AVAILABLE TO DEFENDANTS IS ONE RELEVANT FACTOR IN DETERMINING WHETHER THEY ARE A GOOD RISK FOR PROBATION. PERMITTING A TRIAL JUDGE TO WEIGH THIS FACTOR IN DETERMINING WHETHER PROBATION WOULD BE APPROPRIATE, AND ON WHAT CONDITIONS, FURTHERS THE BROAD SENTENCING DISCRETION NECESSARY FOR AN EFFECTIVE CRIMINAL JUSTICE SYSTEM AND FURTHER AIDS THE EFFICACY OF A PROBATION SYSTEM WHICH, TO BE FULLY EFFECTIVE, MUST HAVE A BROAD BASE OF PUBLIC SUPPORT.

Turning now to the sentencing phase, it is important to remember that the present case does not involve imprisonment for the immediate failure to pay a fine, Tate v. Short, supra, or imprisonment beyond the

statutory maximum as a penalty for the failure to pay a fine. Williams v. Illinois, supra. Petitioners are not being held beyond the statutory maximum penalty, but rather, their basic claim is that they have a right to probation. Having been duly convicted by a jury, and having had their convictions reviewed, any liberty interest which the Petitioners may have has been extinguished. Meachum v. Fanno, 427 U.S. 215, 224 (1976). At issue here is an examination of the sentencing function of a trial judge. The importance of the sentencing function cannot be overemphasized, since this is the area by which the public judges the success or failure of the criminal justice system, for it is here that they see the results of that system. The matter of whether the sentence is too short, too long, or the wrong type may later cause the criminal defendant to repeat his criminal endeavors, lead to new criminal offenses, or result in others committing criminal offenses

because they see that the punishments which have been meted out in the past have not outweighed the gain which they perceive they have received from their criminal escapade. If the public perceives that there are no sanctions for individuals who violate the terms and conditions of probation then obviously the public will view probation as a useless sentencing alternative. Similarly, a court if it is unable to enforce any violations of the conditions which it attaches to probation may draw the conclusion that probation is no longer a useful rehabilitative alternative.

The concept that sentencing should fit the individual and the crime is recognized in Williams v. New York, 337 U.S. 241 (1949), wherein the Court approved for sentencing purposes the evaluation of data pertaining to the defendant that would be inadmissible

on the question of guilt or innocence. Not only should the sentencing judge be provided with broad discretion in considering various sentencing alternatives, in those areas where the jurors do sentencing similar discretion must be afforded to them.[7/]

In deciding upon an appropriate sentence for one convicted of a crime there are many factors which the trial judge must weigh, and sometimes he is placed in a dilemma when weighing all those factors in attempting to arrive at an intelligent exercise of the discretion which has been placed in the judge by virtue of his office. Social factors such as family history, educational achievement,

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7/ See Green v. Georgia, 442 U.S. 95 (1979); Lockett v. Ohio, 438 U.S. 586 (1978); Hawes v. State, 240 Ga. 327, 238 S.E. 2d 418 (1977); Fleming v. State, 240 Ga. 142, 240 S.E.2d 828 (1977).

employment opportunities, ties with the community, nature of the crime, and the record of the offender are all matters which the trial judge takes into consideration. That is not to say that the trial judge may not consider other factors which he deems appropriate to determining whether a non-penal disposition is appropriate and the chances of its success. The fact that the Petitioners were all older citizens, and the fact that they had previously in regard to a guilty plea been placed on probation and assessed a fine probably prompted the trial judge to consider probation in this instance.

In considering probation the trial judge must reach some conclusion as to whether the defendants are a good risk. In assessing risk prior criminal history should be examined to indicate whether the offender has in the past given any indication

that probation would not be successful. The judge may also consider family and family support. In every case the judge must ask the question of whether the offender can succeed on probation. Ultimately, only the defendant can ensure a successful probation, for in the end that is the offender's responsibility.

When a defendant and those individuals who are interested in a defendant's welfare directly participate in ensuring the success of probation and thus avoiding imprisonment, that responsibility is increased. The employment potential of the probationer provides the sentencing judge with some assurance that the offender has an added stake in the success of probation. A fine sometimes accomplishes the same purpose.

Regardless of whether the fine is paid in advance or on the installment plan, it provides an assurance to the sentencing judge that the potential probationer will have a greater responsibility in conforming his conduct to the law. Naturally, the fear of revocation and possible imprisonment has an immediate impact on the probationer, and may serve as a curb to overcome any temptation to violate the terms and conditions of probation. The payment of a fine provides a probationer with a heightened interest in the success of his probation.

The court may also legitimately consider the offender's ability to pay the fine, and may consider offers of payment from family members, or from the offender's employer. In this instance, there is testimony that the Petitioners' employers had in the past paid such fines, which can be viewed by the trial court as an indication that the

employers of the Petitioners had an interest in the Petitioners as continued employees and that these businesses would seek to confrom their activities to the law in the future rather than risk the loss of their investment in the success of the Petitioners' probation. Such a willingness by third parties to pay a fine indicates that the Petitioners had the support of others as they attempted to become law abiding citizens. Payment of a fine by an employer is similar to payment of a fine by family members or friends. Such support is clearly an important consideration in assessing the probability of a given probationer's success.

When the assurances that prompt a trial judge to impose a conditionally probated sentence do not materialize, the factors which determine the probation-worthiness of the offender are no longer present.

Consequently, the basis of the judge's decision to grant probation has been materially altered and must be reassessed. When the assuring factors which were present when the judge imposed probation fail to materialize the defendant thus becomes a poor risk for probation. When the conditions surrounding the reassuring factors to insure success on probation cannot be satisfied, the probation does not become effective and the sentence must be served. Petitioners did not seek a modification of the terms and conditions of probation until after the court had held the hearing on the probation officer's petition to revoke probation.[8/] It was not until some two and

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8/ Georgia permits the sentencing judge to modify the terms and conditions at any time during the term of the sentence which has been probated. Ga. Code Ann. § 27-2709 (1978 Rev.).

one-half weeks after the revocation hearing that Petitioners sought to modify the conditions of probation. (Appendix 35-36).

Generally the availability of financial resources to a criminal defendant is not a controlling factor in terms of whether the individual is a good risk for probation. It is the nature of the crime and the record of the offender that is crucial. However, such as in this case, the availability of financial resources is certainly an important factor; it is a rational factor.

The sentencing discretion provided to trial judges should not be limited. The availability of financial resources to the offender plays an appropriate role in the exercise of that discretion. The presence or existence of economic resources will play a minor, if not nonexistent, role in many cases but in some few cases it plays an important role. Restrictions of the

sentencing discretion given to trial judges should not as a general rule be applauded. In this case restrictions on sentencing serve only to frustrate the state's interest in maintaining an effective criminal justice system.

The mere possibility that some judges will abuse the discretion with which they are entrusted should not be a sufficient basis to limit the discretion of all judges.[9/] Cf., Williams v. New York, 337 U.S. 241, 251-252 (1949). The consequences of limiting a judge's sentencing discretion are unthinkable. If a judge cannot impose a period of probation because he has no means of enforcing violations of probation then many defendants

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9/ To curb any abuses which may occur during sentencing, the General Assembly of Georgia has adopted a Sentence Review Panel to review all sentences of five years or more for harshness. Ga. Code Ann. § 27-2511.1 (1978 Rev.).

would find themselves incarcerated without the opportunity to demonstrate their probation-worthiness by putting up a financial stake. Cf., Tate v. Short, 401 U.S. 395, 401 (1971); (Blackmun, J. concurring).

The Supreme Court of Georgia in Hunter v. Dean, 240 Ga. 214, 239 S.E.2d 791 (1977), certiorari improvidently granted, 439 U.S. 281 (1978), recognized that assurance of third party help is a rational factor for a trial judge to consider in determining probation. Id. at p. 218. See also Calhoun v. Couch, 232 Ga. 467,207 S.E.2d 455 (1974).

The use of installment plans for the payment of a fine was recognized in Williams v. Illinois, 399 U.S. 235, 245 n. 21 (1970). In Williams, supra, the Court cited with approval statutes in California, Michigan and Pennsylvania. The California statute permitted the payment of a fine in installments

with imprisonment in the event of default, but for no longer than the maximum term for which the defendant might have been sentenced. [10/] Id. at p. 247.

The Court further went on to say in Williams, supra, that a state cannot fail to enforce fines against indigents because to do so would amount to "inverse discrimination." Id. at p. 244.

Public perception of the success or failure of the criminal justice system is a direct result of the exercising of the sentencing function vested in the trial judge. Permitting the judge to have wide sentencing discretion in terms of conditional releases such as probation, restitution and other post-conviction sentencing alternatives must have a broad base of public support. Recognition that the public has a keen

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10/ Cal. Pen. Code Sec. 1205 (1968).

interest in and awareness of the effectiveness of the criminal justice system was evidenced in this Court's 1976 opinions concerning capital punishment. Cf., Gregg v. Georgia, 428 U.S. 153, 179-180 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 352-353 (1976) (White J., dissenting). Sentencing alternatives which do not provide for incarceration are particularly susceptable to public scrutiny, and when those alternatives are viewed as ineffective the public reacts in seeking a legislative termination to such programs.

As the rate of crime continues to spiral many states have found themselves confronted with the decision as to whether mandatory sentencing procedures should be invoked. In the last four years the movement towards mandatory sentencing has increased, with the General Assembly of Georgia this year adding two mandatory enactments, in addition to its earlier providing for mandatory sentences for certain crimes in 1977 and

1976. Ga. Code Ann. § 79A-811 (1978 Rev.) [controlled substances], Ga. Code Ann. § 26-1902(a)(b) (1977 Rev.) [minimum penalty for armed robbery, with the Legislature precluding any suspension or probation of sentence] and Ga. Code Ann. § 26-1601 (1977 Rev.) [mandatory minimum sentence for second conviction for burglary which precludes the sentence being suspended or probated]. See also Rummell v. Estelle, ___ U.S. ___, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980).

Maintaining public confidence in Georgia's Statewide Probation Act is one of utmost importance if the State is to achieve another legitimate objective, the rehabilitation and punishment of offenders outside the confines of a penal institution.

The Constitution does not empower the second-guessing of judicial officials with the difficult task which trial judges face in enforcing the State's criminal laws, even where the impact may result in a period of incarceration for one who was given an earlier act of grace by being placed on probation, but because of a change in a factor which was used by the trial judge in placing the individual on probation that person later became incarcerated for a period not exceeding the statutory maximum penalty for that offense.

CONCLUSION

As noted earlier, indigency or poverty is not a "suspect" classification for equal protection analysis. Further, it appears that Petitioners concede the validity of the statutes authorizing probated sentences conditioned upon the payment of a fine. See Ga. Code Ann. §§ 27-2529, 27-2709, 27-2901 (1978 Rev.). Petitioners' contention is simply that as applied, they deny them equal protection of the law.

Respondent has shown that in some circumstances it is necessary for a sentencing judge to assess the financial resources available to an offender to ensure that the offender is a good risk for probation. Examining resource availability furthers the undeniable rational and legitimate state interest in investing trial judges with a broad sentencing discretion. Consideration that

payment will be made by a third party strengthens the probability of an offender's chances for successfully completing probation, since it demonstrates third party support to ensure that the probationer will have a successful period of probation. Particularly when an employer is the source of the fine additional likelihood of success is heightened because the individual has employment which indicates that the probationer will be able to support themselves, and in this case it is also an indication that the employer has a continued interest in the employee and wishes to ensure that his future conduct conforms to the law when earlier conduct led to the employee's conviction, for to do otherwise would mean that the employer would be risking the loss of the investment and the success of the petitioner's continued probation.

In assuring trial judges a broad sentencing discretion it promotes another rational and legitimate state interest - maintaining public confidences in the viability of a conditional release system.

The relationship between any classifications drawn and the purpose for which they are drawn is clear and rational, and under the traditional equal protection analysis applicable to this case, the Equal Protection Clause has not been offended. Consequently, the judgment of the Court of Appeals of Georgia should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JOHN W. DUNSMORE, JR., Attorney of Record for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served the foregoing Brief for Respondent on the Petitioner by depositing a copies of same in the United States mail, with first class postage, prepaid, addressed to Counsel of Record at the following post office address:

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This 10th day of September, 1980.

/s/
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